IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMIN ANTITRUST LITIGATION	**Misc. No. 99-197 (TFH)**
THIS DOCUMENT RELATES TO ALL ACTIONS (except Case Nos. 00-1030 and 00-1236	**MDL No. 1285**

Report and Recommendations of the Special Master Respecting Plaintiffs' Motion to Compel Defendants to Produce 30(b)(6) Witnesses and Officers, Directors and Managing Agents for Depositions in the United States

This report addresses issues raised by plaintiffs' August 3, 2001, motion to compel certain foreign defendants "to produce their Rule 30(b)(6) witnesses and officers, directors and managing agents for depositions in Washington, D.C. or such other location in the United States agreed to by the parties."[1/] Having considered the full record, including the memoranda, exhibits, declarations, and other materials submitted by the parties, the arguments presented at the hearing on August 15, 2001, and other pertinent materials in the record before the Court, for the reasons

1/ Plaintiffs' Motion to Compel Foreign Defendants to Produce Rule 30(b)(6) Witnesses and Officers, Directors and Managing Agents for Depositions in the United States, dated Aug. 3, 2001 ("Pls. Mot."), at 1. Plaintiffs assert that their motion applies to 11 named foreign defendants, F. Hoffmann-LaRoche Ltd.; BASF AG; Rhône-Poulenc S.A.; Rhône-Poulenc Animal Nutrition S.A.; Daiichi Pharmaceutical Co., Ltd.; Eisai Co., Ltd., Merck KGaA; E. Merck; Reilly Chemicals, S.A.; Degussa AG; and Lonza AG (referred to hereinafter as the "foreign defendants"). Id. at 1 n.1. Plaintiffs also assert that the motion should apply prospectively to other foreign defendants – viz., UCB S.A.; Sumitomo Chemical Co., Ltd.; and Tanabe Seiyaku Co., Ltd. – in the event the objections of those defendants to personal jurisdiction are rejected by the Court. Id. I recommend that this Report and Recommendations, depending on the results of any Rule 53 objections thereto, inform, but not necessarily dictate, the outcome on the issue addressed for foreign defendants that are still objecting to personal jurisdiction and thus have not had reason to show particular circumstances that might justify a different ruling.

that follow, I recommend that the plaintiffs' motion be granted, and that each of the foreign defendants subject to the motion be ordered to produce for deposition in Washington, D.C., or such other location in the United States as may be agreed upon, their 30(b)(6) witnesses and up to six officers, directors, and managing agents ("managing agents").

Background

The foreign defendants have stipulated that this Court has personal jurisdiction over each of them for purposes of these actions.[2/] On June 20, 2001, the Court denied the foreign defendants' motion for a protective order requiring plaintiffs to conduct discovery under the Hague Convention, or other applicable treaties and laws, and approved narrowed merits discovery to be taken under the Federal Rules of Civil Procedure. On July 20 and August 2, 2001, plaintiffs noticed 30(b)(6) depositions of nine of the 11 foreign defendants and for six managing agents of two of these defendants for September 2001 in Washington, D.C.[3/]

Before issuing these notices, plaintiffs offered to limit the depositions in the United States to the 30(b)(6) depositions and depositions of six managing agents of each of the foreign defendants. Defendants rejected that offer, insisting that the depositions be "taken where the deponent (party or non-party) resides,"[4/] except that the Swiss defendants insisted that depositions take

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2/ See Stipulation and Order Regarding Personal Jurisdiction and Re-Filing of Actions, filed Jan. 29, 2001, ¶ 4.

3/ These notices are attached as Exhibit No. 1 to Plaintiffs' Motion to Compel.

4/ See Pls. Mot., Exh. Nos. 2, 3.

place in Germany on the ground that it is illegal to take a Federal Rules deposition in Switzerland.[5/]

On August 3, 2001, plaintiffs filed the instant motion to compel and a supporting memorandum, along with exhibits. Among those exhibits were documents published by the U.S. Department of State detailing procedures to be followed by U.S. citizens when taking depositions in Japan, Germany, and France.[6/] On August 9, 2001, defendants filed an opposition to the motion to compel. Among the exhibits attached to defendants' opposition were declarations of Christoph M. Gass, an attorney of F. Hoffmann-La Roche Ltd., and of Joerg Buchmueller, a Vice President and in-house counsel of BASF AG, which detail the burdens that would be imposed on their respective companies should their 30(b)(6) witnesses and/or managing agents be compelled to submit to depositions in the United States.[7/]

On August 14, 2001, plaintiffs filed a reply memorandum in support of their motion to compel. Plaintiffs attached to their reply a declaration of John J. Rosenthal, an attorney who represents one of the plaintiffs in this litigation but whose declaration discusses his experience taking depositions in Germany in the Graphite Electrodes case.[8/] On August 15, 2001, the day of

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5/ See Foreign Defendants' Opposition to Plaintiffs' Motion to Compel, dated Aug. 9, 2001 ("Defs. Opp. Mem."), at 10 n.6.

6/ See Pls. Mot., Exh. Nos. 8-10.

7/ These declarations are attached as Exh. Nos. 12, 19 to Defs. Opp. Mem.

8/ In re Graphite Electrodes Antitrust Litig., MDL No. 1244 (E.D. Pa.). Mr. Rosenthal's Declaration dated Aug. 13, 2001, is Exh. C to Pls. Reply Mem. Defendants had asserted that "the Kenny Nachwalter firm [which represents some of the plaintiffs in this action] took the depositions in Germany [in that case] without any of the Hague Convention procedures that the same firm now argues will be required." Defs. Opp. Mem. at 10-11.

the hearing on plaintiffs' motion, defendants filed a motion for leave to submit supplemental authority in opposition to the motion to compel, and attached declarations of David E. Miller and Jerome S. Fortinsky. Mr. Miller's declaration states that he is a partner in a law firm representing one of the foreign defendants and that, in a prior case, he took depositions in France and Germany that were no different from Federal Rules depositions taken in the United States. Mr. Fortinsky's declaration states that he is a partner in a law firm representing one of the foreign defendants and that he was one of the attorneys representing a defendant in the Graphite Electrodes litigation. He takes issue with Mr. Rosenthal's declaration as it relates to procedures governing depositions in Germany and, in particular, as to what transpired in the Graphite Electrodes case Mr. Rosenthal discusses in his declaration.

On August 17, 2001, two days after the hearing, defendants filed a second motion for leave to submit supplemental authority. Attached to their motion is a declaration of Iva Nathanson, Vice President of Manhattan Reporting, a court reporting service headquartered in New York City. Ms. Nathanson states that her firm has provided court-reporting services for approximately 50 depositions in Germany and 40 depositions in France, and that such depositions were taken under the authority of the Federal Rules of Civil Procedure and took place without any foreign or U.S. State Department approval or intervention. On August 17, 2001, counsel for defendants Daiichi Pharmaceutical Co., Ltd., and Eisai Co., Ltd., submitted a letter stating that depositions may be taken in Japan in accordance with the Federal Rules of Civil Procedure and detailing when conference rooms at the American Consulate in Osaka and the American Embassy in Tokyo would be available for depositions.

On August 24, 2001, plaintiffs filed a motion for leave to submit supplemental authority, and attached declarations of Joachim Zekoll, a Professor of Law at the University of Frankfurt, and Alexander Blumrosen, a partner in a French law firm. Messrs. Zekoll and Blumrosen state that depositions in Germany and France must be taken in accordance with those nations' laws, and that an order from a United States District Court that such depositions be taken under the Federal Rules does not obviate the need to follow French and German law while taking depositions within those nations' borders. Plaintiffs also attached a letter from William F. Daniels, Consular Officer of the U.S. Department of State's European Division Overseas Citizens Services. Mr. Daniels states that "a U.S. court order which provides that overseas discovery of citizens and foreign nationals in Germany [is] to be conducted under the U.S. Federal Rules of Civil Procedure[ ] does not override or invalidate the required German government's procedures" applicable to depositions. On August 30, 2001, plaintiffs submitted a redacted Order to Compel Discovery in Dean Foods Co. v. Eastman Chemical Co., No. C 00-4379 WHO (JL) (N.D. Cal. Aug. 13, 2001), a ruling referenced in but not yet published at the time of their earlier filings, and discussed at the hearing.[9/]

The Parties' Contentions

The plaintiffs maintain that depositions of the foreign defendants' 30(b)(6) witnesses and managing agents should take place in Washington, D.C., rather than in Japan, Germany, and France, on the ground that depositions within those nations' territorial borders are subject to

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9/ See Pls. 8/3/01 Mem. at 10; Transcript of Aug. 15, 2001, hearing ("8/15/01 Tr.") at 27-30. The parties' various motions for leave to submit additional authority are granted. I have given the attached authorities and declarations such weight as they deserve.

cumbersome, inefficient procedures and laws that would impose "insurmountable obstacles" to necessary discovery, entailing unacceptable delay and excessive expense. Plaintiffs also argue that the defendants have been able to conduct depositions of the plaintiffs in the United States without similarly cumbersome procedures, and that fairness dictates that plaintiffs be given the same opportunity. Finally, plaintiffs argue that the Court has discretion to set the depositions in whatever place it deems best, and that an analysis of the factors courts consider in determining whether foreign parties' 30(b)(6) witnesses and executives should be deposed here or in their home countries favors setting the depositions in the United States.

Defendants respond that plaintiffs' motion seeks a ruling that goes against the understanding and practice of the parties to this litigation: namely, that depositions will occur in the location most convenient for the deponent. Defendants assert that plaintiffs should not be heard to argue that depositions in Japan, Germany, and France will have to take place according to the laws of those states after successfully arguing that discovery should take place pursuant to the Federal Rules, not the Hague Convention or comparable treaties and foreign laws. Defendants also argue that the general rule governing the location of depositions is that, absent "special circumstances," corporate deponents are deposed at the corporation's principal place of business. Finally, defendants argue that there are no such special circumstances here, and that plaintiffs can take timely Federal Rules-type depositions in Japan, Germany, and France without impediments and without approval or intervention from those nations.

Report and Recommendations

Rule 30(b)(1) tasks the party taking a deposition with providing all other parties written notice "stat[ing] the time and place for taking the deposition * * *." Defendants cite a number of

cases for the proposition that "[i]f a corporation is noticed for deposition at a location other than its principal place of business, and the corporation objects, 'the objection should be sustained unless there are unusual circumstances which justify such an inconvenience to the corporation.'" See Defs. Opp. Mem. at 12-13, quoting Zuckert v. Berkliff Corp., 96 F.R.D. 161, 162 (N.D. Ill. 1982); see, also, Defs. Opp. Mem. at 13 n.11.

Although defendants are correct that depositions of a corporation are generally conducted at its principal place of business, the case law and treatises reflect that where a dispute arises courts have discretion to order a different location depending upon the circumstances. See, e.g., Fin. Gen. Bankshares, Inc. v. Lance, 80 F.R.D. 22, 23 (D.D.C. 1978) (holding that the location of depositions of defendants "ultimately is within the discretion of the Court, and instances of defendants having to appear for depositions at the place of trial are not unusual"); 7 Moore's Federal Practice § 30.20[1][b][ii], at 30–36; 30-37 (3d ed. 2001) ("[t]he deposition of a corporation through its officers or agents normally must be taken at its principal place of business" but "[c]ourts retain substantial discretion to designate the site of a deposition"); 8A Charles Alan Wright et al., Federal Practice and Procedure § 2112, at 74-75, 81 (2d ed. 1994) ("[t]he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business," but, "[o]n a motion the court has a wide discretion in selecting the place of examination," and "[t]he particular facts of each case will determine the selection of a place for examination").

Courts have suggested that the presumption identified by defendants that "depositions occur at a corporation's place of business," Defs. Opp. Mem. at 12, is "'merely a decision[al] rule that facilitates determination when other relevant factors do not favor one side over the

other.'" See, e.g., Custom Form Mfg., Inc. v. Omron Corp., 196 F.R.D. 333, 336 (N.D. Ind. 2000) (citation omitted); 7 Moore's Federal Practice § 30.20[1][b][ii], at 30-37 (same). Thus, there are numerous cases in which courts have ordered depositions of foreign defendants taken in the United States, rather than at the defendant's principal place of business. See, e.g., McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70 (D.D.C. 1999); Fin. Gen. Bankshares, 80 F.R.D. at 23; Custom Form, 196 F.R.D. at 336-37.

Where location is disputed, courts generally consider a variety of factors in determining whether the deposition of a foreign corporation should occur in the United States or abroad. These factors include:[10/] (1) the burden to the parties of holding the depositions in the United States relative to the burden of holding the depositions abroad,[11/] including the burdens imposed on the witnesses and the parties' counsel;[12/] (2) the court's ability to supervise depositions in the contested location;[13/] (3) whether depositions would be impeded by any legal

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10/ Although not every case addressing this issue discusses all of the factors, those I now describe are generally understood to be relevant considerations.

11/ See, e.g., Afram Exp. Corp. v. Metallurgiki Halyps. S.A., 772 F.2d 1358, 1365 (7th Cir. 1985); McKesson, 185 F.R.D. at 80-81; Custom Form, 196 F.R.D. at 336-37; In re Honda Am. Motor Co., 168 F.R.D. 535, 539-40 (D. Md. 1996).

12/ See, e.g., Afram Exp. Corp., 772 F.2d at 1365 (considering defendant's frequent business travel to the United States); Fin. Gen. Bankshares, 80 F.R.D. at 23 (considering location of counsel); Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547, 551 (S.D.N.Y. 1989) (considering the location of counsel and the witnesses); R.F. Barron Corp. v. Nuclear Fields (Australia) Pty. Ltd., No. 91 C 7610, 1992 U.S. Dist. LEXIS 13067, at *3-4 (N.D. Ill. Aug. 27, 1992) (allowing depositions of foreign defendants to be taken in Chicago, rather than the countries where they reside, because deponents would be in Chicago for a convention); D'Agostino v. Johnson & Johnson, 576 A.2d 893, 898 (N.J. Super. Ct. App. Div. 1990) (considering the foreign defendants' frequent business travel to the United States).

13/ See, e.g., McKesson, 185 F.R.D. at 80; Fin. Gen. Bankshares, 80 F.R.D. at 23; Afram Exp.

(continued...)

or procedural barriers in another nation;[14] and (4) the potential affront to the sovereignty of a foreign nation if a deposition pursuant to the Federal Rules of Civil Procedure is held within its borders.[15]

The cases cited by defendants are consistent with the court having discretion to set the location of depositions where it finds the circumstances warrant.[16] Those cases identify a

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13/ (...continued)
Corp., 772 F.2d at 1365; Custom Form, 196 F.R.D. at 336-37.

14/ See, e.g., In re Honda, 168 F.R.D. at 540; Triple Crown Am., Inc. v. Biosynth AG, No. 96-7476, 1998 U.S. Dist. LEXIS 6117, at *10 (E.D. Pa. Apr. 29, 1998); Dean Foods Co. v. Eastman Chem. Co., No. C 00-4379 WHO (JL), slip op. at 9 (N.D. Cal. Aug. 13, 2001) (considering "which deposition location would be most expeditious for the progress of the litigation, including any constraints on discovery in the foreign country").

15/ See e.g., McKesson, 185 F.R.D. at 81 (finding that holding a deposition in Iran would burden Iran's sovereignty); In re Honda, 168 F.R.D. at 538 ("[I]f a federal court compels discovery on foreign soil, foreign judicial sovereignty may be infringed, but when depositions of foreign nationals are taken on American or neutral soil, courts have concluded that comity concerns are not implicated."); Custom Form, 196 F.R.D. at 336-37 (same).

16/ I am not persuaded by defendants' attempt to distinguish cases in which courts have required foreign defendants to travel to the United States to be deposed. See Defs. Opp. Mem. at 13-14. In several of the cases identified by defendants as addressing solely which country's procedural laws should be followed, the courts considered where the depositions of a foreign party should take place. See, e.g., Custom Form, 196 F.R.D. at 336-37 (ordering depositions in Illinois, rather than Japan, based on sovereignty concerns, the absence of a special showing of hardship on the part of the Japanese company, the time and expense of holding the depositions in Japan, and the absence of a federal judge in Japan); In re Honda, 168 F.R.D. 535 (ordering deposition in Baltimore, rather than Japan, based on United States sovereignty concerns, the limitations imposed by Japanese laws, the costs of travel, the location of documents; and the potential for delay). Other distinctions argued by defendants appear to be immaterial or nonexistent. For example, defendants argue that in McKesson Corp., 185 F.R.D. 70, the foreign locations suggested as alternatives to the United States were neither the defendant's principal places of business nor had any relation to the dispute. Although it is true that the court considered London and the Hague as locations for the depositions, the defendant therein stated that the best site for the depositions was Iran (where the deponents lived and worked) and suggested these alternative

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practice of deposing corporate defendants at their principal place of business; they do not establish a general rule specifying where such depositions must take place. None of the cases cited by defendants identifies the universe of "special" or "unusual" circumstances that would justify setting depositions at a location other than a corporate defendant's principal place of business. I view the factors noted above as fleshing out the concept of "special circumstances" described in Work v. Bier, 107 F.R.D. 789, 792 n.4 (D.D.C. 1985), a case principally relied upon by defendants. See Defs. Opp. Mem. at 10 n.7, 12, 13 & n.12, 17.

Accordingly, I recommend that the parties' dispute over the location of the depositions of these foreign defendants be resolved by considering the factors in light of the record before the Court, and proceed now to do so.

1. Expense and Burden

Plaintiffs maintain that the expense and burden of taking depositions in Europe and Japan far outweigh those entailed by requiring defendants' witnesses to travel to the United States. In support of their position, plaintiffs assert that the depositions will be attended by numerous attorneys, if past practice in this case is to be a guide;[17/] that many of the defendants' attorneys are based in the United States; and that plaintiffs will reimburse defendants for the reasonable

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16/ (...continued)
locations as a compromise. The court rejected all three foreign locations. See, also, M & C Corp. v. Erwin Behr GmbH & Co., 165 F.R.D. 65 (E.D. Mich. 1996) (rejecting defendants' motion for a protective order and ordering depositions to take place in the United States where defendants traveled to the U.S. frequently for business and the discovery sought was after trial and judgment).

17/ Twenty-four attorneys attended the deposition of a representative of LaRoche Entities on June 7-8, 2001, in Washington, D.C., and 25 attended the deposition of a representative of BASF Corporation on July 11-12, 2001, in New York City. See Pls. Mot., Exh. Nos. 4 & 5.

expenses deponents incur in traveling to the United States for depositions. Plaintiffs assert that the travel burdens on defendants' executives should not be dispositive because those defendants' executives routinely travel to the United States to further defendants' commercial objectives and because the foreign defendants are taking the plaintiffs' depositions in the United States, without having to comply with what plaintiffs view as the cumbersome processes applicable in Japan, Germany, and France.

Defendants respond that plaintiffs have alleged a world-wide conspiracy and should not be heard to complain of having to travel overseas to depose witnesses, particularly since many of the plaintiffs are large, multi-national corporations, and "they (and their counsel) are seeking a stratospheric pay day in the hundreds of millions of dollars." Defs. Opp. Mem. at 20.[18/] Defendants assert that plaintiffs fail to consider the costs of disruption to defendants' business operations from key employees having to miss work for as much as a week's time. Defendants also contend that many of the witnesses plaintiffs seek to depose will invoke their Fifth Amendment right against self-incrimination, and thus plaintiffs' estimates about the number of lawyers needing to attend are unfounded. Additionally, defendants argue that the locations noticed by plaintiffs are "contrary to the established course of dealing among the parties," which has been that "depositions will occur in locations convenient for the deponent." Id. at 5.

As an initial matter, I do not find that the past practice in this case has established a binding rule that determines the location of depositions of representatives of the foreign defendants. Defendants, however, have made a showing that they will be burdened if their executives

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18/ Defendants further note that "[f]ees of th[e] magnitude [recently awarded to class counsel] would cover a lot of trips to Europe." Defs. Opp. Mem. at 20 n.21.

have to travel to the United States to give depositions.[19] On balance, though, this factor weighs in favor of ordering depositions to take place here. Given the number of parties and attorneys actively involved in this litigation, and, in particular, the number of defense attorneys with offices in or easily accessible to Washington, D.C. (whose travel, food, and lodging costs to attend depositions in Europe and Japan would impose significant burdens on their clients), there are considerable efficiencies to be gained by ordering depositions here that outweigh the burdens imposed by requiring defendants' 30(b)(6) witnesses and managing agents to miss work because of travel time.[20] That some or even many managing agents may avail themselves of their right not to incriminate themselves does not seem to be a strong reason for requiring depositions abroad: the depositions for such witnesses, including preparation time, will likely be of such a short duration that the impact on defendants' businesses will be minimal.[21] Limitation of the number of managing agent depositions in the United States (exclusive of consensual depositions) to six per foreign defendant, the figure plaintiffs initially proposed to defendants, further cabins the burden on these defendants.

19/ See Declarations of Christoph M. Gass and Joerg Buchmueller. Defs. Opp. Mem., Exh. Nos. 12, 19.

20/ Plaintiffs' offer to reimburse defendants for the reasonable expenses for their witnesses to travel to the United States removes that cost element from consideration. See Pls. 8/3/01 Mem. at 11.

21/ Should all or most of the managing agents noticed for a particular foreign defendant plead the Fifth, plaintiffs might have cause to seek leave for additional managing agent depositions in the United States. Letter exchanges between counsel indicate that the parties have been working to establish mechanisms that will minimize attorney time and expense where witnesses noticed for deposition intend to plead their Fifth Amendment privilege, but will still permit plaintiffs to make the record they desire. See, e.g., letter dated August 29, 2001, from Stephen Fishbein to John Kinney. These efforts are to be encouraged.

2. Supervision of Depositions

Plaintiffs maintain that depositions of foreign defendants' 30(b)(6) witnesses and managing agents are likely to be contentious and that the resolution of any disputes would be hampered by the distance and time differences between the United States on the one hand, and Europe and Japan on the other. Defendants respond that Federal Rules discovery, unlike the taking of evidence in civil law countries, "is left to the parties *without* direct involvement by the court." Defs. Opp. Mem. at 21. Defendants further note that depositions of UCB, S.A., executives in Belgium in this case took place without any need to resolve disputes, and that the Special Master has been called upon to resolve a dispute during the middle of only one of the more than 200 depositions already taken in this case. Id. at 21-22. On that basis, defendants predict that the need for judicial intervention, if any, will not be so great as to require a bright-line rule placing their witnesses' depositions in Washington, D.C.

As I have noted during hearings on issues presented to me as Special Master for this litigation, the parties are to be commended for their efforts to resolve disputes without judicial intervention. The many depositions that have taken place thus far without active judicial supervision are evidence of that record. Still, disputes requiring judicial resolution have delayed certain portions of discovery for almost two years, and some discovery currently awaits judicial resolution of this and other issues. Given the significance of the deposition discovery now at issue and the likely assertion of testimonial privileges,[22/] it is not unlikely that disputes requiring judicial

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22/ For example, at the hearing, counsel for the defendants stated that the defendants' witnesses could assert testimonial privileges based on their respective nations' privacy laws regardless of where the depositions taken place. See 8/15/01 Tr. at 115, 125.

intervention will arise during the conduct of these depositions. Were this the beginning of the case and the discovery cutoff date a distant speck on the horizon, any concerns about prompt judicial supervision and resolution of deposition disputes might not be that weighty. But that time period has been expended. Judge Hogan has made abundantly clear in his July 28, 2001, scheduling order that fact discovery must proceed apace and be completed by February 11, 2002, and that the parties cannot assume that requests to extend scheduling dates will be freely granted. Requiring depositions to occur in Washington, D.C., would increase the chances that such disputes could be resolved promptly and that the parties can meet their obligations under the scheduling order. Accordingly, this factor weighs in favor of ordering depositions to take place in Washington, D.C.

3. **Legal and Procedural Impediments in Japan, Germany, and France**

Plaintiffs maintain that the depositions for defendants' 30(b)(6) witnesses and managing agents should be taken in Washington, D.C., because depositions in Japan, Germany, and France would be subject to cumbersome legal and procedural requirements under the laws of those nations. Defendants respond that the Court's June 20, 2001, Order that merits discovery proceed under the Federal Rules trumps foreign laws and rules, and that depositions in Japan, Germany, and France could proceed as if they were taking place in the United States. The evidence submitted by the parties in support of their contentions reflects widely divergent views. For the reasons that follow, I find that this factor also weighs in favor of locating the depositions in Washington, D.C.

a. Japan

As to Japan, plaintiffs submitted materials from the American Consulate in Osaka, Japan, that detail the steps required for taking voluntary depositions of Japanese witnesses in Japan.[23/] Plaintiffs maintain that these steps are unduly burdensome and that the requirement that depositions take place only at the U.S. Embassy or Consulates is unworkable given the limited size and availability of rooms and the number of attorneys expected to attend the depositions. Plaintiffs also submitted the August 13, 2001, opinion in Dean Foods,[24/] which found that the procedural requirements for depositions at the American Consulate "constitute a substantial obstacle to the smooth conduct of proceedings" and ordered that depositions of the Japanese defendant's managing agents take place in San Francisco, with deponents' reasonable expenses to be borne by plaintiffs.[25/]

23/ According to those documents, a party must (1) telephone the Consulate to determine which dates and which rooms in the U.S. Embassy or Consulate are available; (2) make an initial reservation; (3) submit the initial reservation fee of $400; (4) apply for and receive a court order scheduling the deposition, and send the order and a list of all attorneys who will participate in the deposition; (5) submit a $200-per-day deposit for the room (the party will also have to pay $200-per hour for consular fees if the transcript is to be certified); (6) obtain visas from the Japanese government for the attorneys planning to attend; (7) arrange for stenographers, videographers, and interpreters; and (8) arrange for the transcripts. Pls. Mot., Exh. No. 8.

24/ Dean Foods Co. v. Eastman Chem. Co., No. C 00-4379 WHO (JL) (N.D. Cal. Aug. 13, 2001).

25/ Magistrate Judge Larson issued an oral ruling on July 11, 2001, denying a motion for protective order filed by a Japanese defendant and ordering the defendant to produce its witnesses for depositions in San Francisco. See Pls. 8/3/01 Mem. at 10 and Exh. No. 12. This ruling was affirmed on August 2, 2001, by District Judge Orrick. See 8/2/01 Transcript at 4 (submitted under cover of letter dated Aug. 16, 2001, of John F. Kinney). Magistrate Judge Larson stated the reasons for his July 11, 2001, ruling in a written opinion published August 13, 2001, which is referenced above in the text.

The Japanese defendants do not take specific issue with the list of requirements plaintiffs set forth as applying to depositions at the U.S. Consulate or Embassy. Nevertheless, counsel for the Japanese defendants advised in a letter of August 17, 2001 that "there are no procedures or rules in Japan that will prevent depositions in Japan, in this litigation, from being conducted in accordance with the Federal Rules of Civil Procedure as ordered by this Court." The same letter does acknowledge, however, that depositions in Japan must be taken at the American Consulate or Embassy; that a deposition room in the Consulate holding eight people will not be available until October 9, 2001; that a room holding 15 people will not be available until November 17, 2001; and that a room holding 20 people at the American Embassy in Tokyo will not be available until January 17, 2002.

I find that the steps required for taking depositions at the American Consulate are a burden but not so onerous as to be dispositive as to this factor. Still, given the February 11, 2002, cutoff for fact discovery, the number of attorneys who can reasonably be expected to attend the depositions, and the size and availability of conference rooms,[26/] I conclude that this factor weighs in favor placing depositions of the Japanese defendants' 30(b)(6) witnesses and managing agents in Washington, D.C., rather than Japan.

b. Germany

As to Germany, plaintiffs submitted materials of the U.S. Consulate General in Frankfurt, Germany, that detail the steps that must be taken to conduct voluntary depositions within

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26/ I am not persuaded that the limited availability of rooms could be overcome by videoconferencing.

Germany's borders.[27] Plaintiffs also submitted a letter from a State Department official in Washington, D.C., William F. Daniels, that supports plaintiffs' contentions that German discovery procedures apply to depositions notwithstanding the Court's June 20, 2001, Order specifying that merits discovery be taken under the Federal Rules rather than the Hague Convention. Mr. Daniels's letter states, in relevant part:

> "a U.S. court order which provides that overseas discovery of citizens and foreign nationals in Germany [is] to be conducted under the U.S. Federal Rules of Civil Procedure[ ] does not override or invalidate the German government's procedures which are set forth in the U.S. Consulate General-Frankfurt's website [ ]. Specifically, German law requires that any "U.S.-style" depositions of individuals in Germany be administered by the U.S. Embassy or Consulate, etc., and are not superseded by any U.S. Court order that depositions be conducted under the Federal Rules. It has long been the State Department's understanding of German law that private litigants cannot simply take depositions on their own of foreign nationals in Germany–even if there is a US court order that depositions be made under the Federal Rules."

Plaintiffs also submitted a Declaration of Joachim Zekoll, who states:

> "even with an order from this Court requiring that discovery proceed under the Federal Rules of Civil Procedure, plaintiffs will violate German law if they conduct Federal Rules depositions of German nationals in Germany without following the procedures set forth in the [Hague] Evidence Convention or other diplomatic agreements. * * * The procedures set forth in the Evidence Convention and on the U.S. Consulate General-Frankfurt's website are part of German domestic law, and offer the exclusive means by which plaintiffs lawfully

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27/ Pls. Mot., Exh. No. 9. According to those materials, depositions must take place at the U.S. Embassy or one of the consulates; the testimony "must be given voluntarily without coercion or threat of future sanctions"; and "prior to the taking of testimony and in accordance with German law, the consular officer will administer a voluntariness advisement to each witness." After receiving notice of the deposition, the American Embassy will notify the German Ministry of Justice of the deposition, which will, in turn, notify the appropriate State government in Germany. The plaintiffs must pay a $400 scheduling fee and $200 per hour for consular services.

> may take depositions of German nationals within Germany for use in U.S. legal proceedings. [footnote omitted]"[28/]

Finally, plaintiffs submitted a Declaration of John J. Rosenthal, an attorney representing one of the plaintiffs in this action, which sets forth Mr. Rosenthal's views on whether Federal Rules depositions may take place in Germany based on his experiences in another case.

Although in their opposition brief defendants did not take issue with the materials plaintiffs submitted from the U.S. Consulate General Frankfurt that detail the steps plaintiffs would have to follow to depose witnesses in Germany, at the hearing defendants maintained that the Court's June 20, 2001, Order allowing discovery to proceed under the Federal Rules rendered the German procedures inapplicable. In defendants' view, depositions could take place in Germany pursuant to the Federal Rules, without the approval or intervention of the German government. Counsel representing the European defendants stated:

> "[T]he deposition will be exactly as if it were taken in Brooklyn. That is exactly right. That's what Judge Hogan ordered and that's what we're prepared to do." 8/15/01 Tr. at 115.

Defense counsel had earlier acknowledged that there was no case dealing with whether parties could conduct a Federal Rules deposition in Germany as if it were in Washington, D.C. Id. at 109. Defendants asserted at the hearing that depositions would not be voluntary and that defendants would be subject to the Court's sanction power if their witnesses refused to testify. Defendants also submitted a Declaration of Iva Nathanson, who stated that her court-reporting

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28/ Declaration dated August 24, 2001, ¶¶ 11-12. Mr. Zekoll previously submitted a declaration in support of plaintiffs' motion to compel jurisdictional discovery under the Federal Rules, and I recognized him as qualified to express opinions on the Hague Convention and German law as they may affect plaintiffs' discovery. 8/15/00 Report and Recommendations at 32.

service has been involved in approximately 50 depositions in Germany that were conducted without the involvement of foreign judicial or consular officials and took place in private offices or hotel conference rooms. Finally, defendants submitted the Declarations of David E. Miller and Jerome S. Fortinsky, each of whom states that he has conducted Federal Rules depositions in Germany without incident.

Based on the full record before me, I conclude that the requirements of German law respecting the taking of evidence by deposition in Germany of German nationals apply notwithstanding Judge Hogan's June 20, 2001, Order that merits discovery in this case proceed under the Federal Rules. I am not prepared to place significant reliance upon the conflicting declarations of various counsel and court reporters who have participated in depositions in other cases as to whether those depositions proceeded with or without impediments. Nor am I willing to rest upon the representations of defense counsel, which I accept as made in full good faith, that any depositions ordered to take place in Germany would proceed at counsel's office without limitation, particularly since those counsel did not speak on behalf of Germany itself or on behalf of all parties who may be represented at the depositions, including counsel who may be retained by the witnesses.

In reaching this conclusion, I place primary reliance on the declaration of Mr. Zekoll, who reaches the same conclusion set forth by Mr. Daniels.[29/] I also find it significant that the Federal Republic of Germany, which has participated in this litigation by filing an amicus brief urging that merits discovery be taken pursuant to the Hague Convention, did not choose

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29/ As Mr. Daniels's letter does not indicate whether he is an attorney, nor explains his authority to issue an opinion on behalf of the State Department, it is, by itself, not sufficient.

to appear before the Court in support of the position that depositions may be taken within its borders without its approval and without complying with German laws and procedures. I also find it significant that defendants have not been able to explain satisfactorily why Japanese and Swiss laws and deposition procedures would apply to depositions within their borders, but French and German laws and procedures would not. Finally, I rely on the Declaration of Dr. Martin J. Reufels, which was attached in support of defendant BASF's Memorandum in Support of Its Motion for a Protective Order (May 12, 2000). According to Dr. Reufels, under "German international civil procedure law, the Hague Convention on Evidence is the *exclusive* means of obtaining evidence in civil procedure cases [in Germany] that are of an international nature."[30/] Dr. Reufels further opines that "[a]ny disregard of the Hague Convention on Evidence * * * (i.e., allowing plaintiffs to proceed under the U.S. Federal Rules of Civil Procedure within the territory of the Federal Republic of Germany) is seen unanimously as a violation of inter-

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30/ Declaration of Martin J. Reufels ¶ 8 (May 8, 2000). Dr. Reufels also opines that conducting depositions outside the processes of the Hague Convention could expose the parties to criminal prosecutions. Id. at ¶ ¶ 25-28. As with Mr. Zekoll, I recognized Dr. Reufels as "qualified to express opinions on the Hague Convention and German law as they may affect plaintiffs' discovery * * *." 8/15/00 Report and Recommendations at 32.

I do not find convincing defendants' contention that plaintiffs cannot argue that German or French law would apply to depositions within those nations after plaintiffs argued that discovery should be taken pursuant to the Federal Rules rather than through the Hague Convention. I find no inconsistency between arguing on the one hand that the Federal Rules should apply because the Hague Convention could not ensure adequate and efficient discovery, and arguing on the other hand that depositions within a foreign nation's borders must comply with local laws notwithstanding any federal court order providing that discovery proceed under the Federal Rules.

national law and as an infringement of the judicial sovereignty of the Federal Republic of Germany."[31/]

Even though counsel suggested at the hearing that Federal Rules depositions would proceed without incident in Germany because the foreign defendants are subject to the Court's sanction powers and would be unlikely to raise legal or procedural bars to the depositions, I find that insufficient for two reasons. First, it is not altogether unlikely that a number of the foreign defendants' officers, directors, and managing agents will hire their own counsel who, on behalf of their clients, may wish to avail themselves of all available legal and procedural protections. Second, and more importantly, the Court's June 28, 2001, Order makes it imperative that the parties move forward with depositions at an expeditious pace. With fact discovery closing on February 11, 2002, there is insufficient time to take a wait-and-see attitude regarding whether depositions in Germany proceed without incident or whether they must be rescheduled in Brussels or the United States. In sum, this factor weighs in favor of ordering that the depositions of the German defendants take place in Washington, D.C.

c. France

As to France, the plaintiffs submitted a Declaration of Alexander Blumrosen in support of their motion.[32/] Mr. Blumrosen states that "the procedures prescribed by the [Hague] Evidence

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31/ Id. ¶ 9.

32/ Declaration dated Aug. 22, 2001 ("8/22/01 Blumrosen Decl."). Plaintiffs had submitted a declaration of Mr. Blumrosen in support of their motion to compel jurisdictional discovery. In my Report and Recommendations of August 15, 2000, I recognized Mr. Blumrosen as "qualified to express opinions on the Hague Convention and French law as they may affect plaintiffs' discovery * * *." 8/15/00 Report and Recommendations at 37.

Convention provide the exclusive means by which parties may take depositions within France for use in foreign law proceedings." 8/22/01 Blumrosen Decl. ¶ 8a. Moreover, France has enacted a "blocking statute" that criminalizes the taking of depositions on French soil "that are not channeled through the Evidence Convention." Id., ¶ 9. According to Mr. Blumrosen:

> "it is not uncommon for U.S. litigants to resort to taking voluntary and agreed upon depositions in France of French nationals without following the requirements of the Evidence Convention. This practice has arisen, in part, because the French State has yet to engage in any criminal prosecution under the blocking statute, and accordingly no jail terms, fines, penalties or other sanctions have been raised by the French State in connection with the blocking statute. Nonetheless, such depositions without question violate French domestic law and in consequence, it is unlikely that a French court would enforce any judgment from a foreign jurisdiction such as the United States resulting from such improperly obtained evidence. Furthermore, such depositions would be entirely voluntary and * * * plaintiffs would have no means by which to compel testimony from the witness." Id., ¶ 11.

The defendants submitted a Declaration of Iva Nathanson, who stated that her court-reporting service has been involved in approximately 40 depositions in France that were conducted without the involvement of foreign judicial or consular officials and took place in private offices or hotel conference rooms. Finally, defendants submitted the Declaration of David E. Miller, who states that he has conducted Federal Rules depositions in France without incident.

Based on the record before me, I conclude that the requirements of French law respecting the taking of evidence by deposition in France of French nationals apply notwithstanding Judge Hogan's June 20, 2001, Order that merits discovery in this case proceed under the Federal Rules. In reaching my conclusion, I place primary reliance on the declaration of Mr. Blumrosen and on the absence of any contrary foreign law expert opinions supporting the defendants' assertions. I

am not prepared to place significant reliance upon the conflicting declarations of various counsel or court reporters who have participated in depositions in France.

As with Germany, given the uncertainty as to whether Federal Rules depositions may be taken in France without interference, this factor weighs in favor of ordering that the depositions of French defendants take place in Washington, D.C., rather than in France.

d. Switzerland

As to Switzerland, the Swiss defendants agree that Federal Rules depositions are prohibited within that nation's territory. See Defs. Opp. Mem. at 10 n.6; Gass Decl. ¶ 5. The Swiss defendants, however, submit that depositions of their witnesses should take place across the border, in Germany. For the reasons described above, I find that Germany is not free from legal and procedural impediments, and thus this factor weighs in favor of conducting depositions of the Swiss defendants' witnesses in Washington, D.C., rather than in Switzerland or Germany.

4. Affront to Sovereignty

A final factor that weighs in favor of ordering that these depositions be conducted in the United States is the potential that voluntary Federal Rules-type depositions would be an affront to the sovereignty of Germany and France.[33/] See, e.g., McKesson, 185 F.R.D. at 81 (ordering deposition in United States to avoid infringement on Iran's sovereignty). As noted above, defendants insisted at oral argument that Federal Rules depositions in their home countries would be

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33/ There is no similar issue with respect to Japan, where, the parties are agreed, depositions must take place at the U.S. Embassy or one of the consulates, or Switzerland, where, the parties are agreed, Federal Rules depositions would violate Swiss law and should not be pursued.

no different than depositions in the United States,[34/] and that such depositions take place on a regular basis.[35/] But as to any potential affront to sovereignty, defendants do not so much deny the potential as argue its inevitability: why, the defendants seem to ask, should the potential affront to sovereignty require depositions in the United States when the Special Master recommended and the Court ruled that discovery should be taken pursuant to the Federal Rules notwithstanding any affront to the sovereignty of these nations?[36/]

The defendants are, of course, correct that the Court ordered discovery to proceed under the Federal Rules even though such discovery could be construed as an affront to the sovereignty of the nations in which they reside. But that does not mean comity issues should not receive proper weight in subsequent analyses, or that the Court should not make every effort to minimize the potential for affronts to foreign nations' sovereignty.[37/] To the contrary, Aérospatiale's requirements are ongoing.[38/] Furthermore, there is a larger potential for affronts to sovereignty through the taking of testimony from witnesses abroad than from the collection of documents responsive to document requests. See, e.g., In re Honda, 168 F.R.D. at 538 ("when depositions of foreign nationals are taken on American or neutral soil, courts have concluded that comity concerns are not implicated."); Custom Form, 196 F.R.D. at 336-37 (same).

34/ See 8/15/01 Tr. at 109, 121.

35/ See, e.g., id. at 120-21; see, also, Declaration of Iva Nathanson ¶ 3.

36/ See 8/15/01 Tr. at 111.

37/ Accord, Declaration of Dr. Martin J. Reufels ¶ 14 (May 8, 2000) ("Discovery conducted through an alternative means has been found offensive to German sovereignty.").

38/ See Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987).

Accordingly, this factor also weighs in favor of requiring that depositions of the foreign defendants' 30(b)(6) witnesses and managing agents be conducted in the United States.

Conclusion

Having analyzed each of the relevant factors to be considered regarding the place of the depositions and found that special circumstances exist for ordering that depositions take place in the United States rather than at the foreign defendants' principal places of business, I recommend that plaintiffs' motion be granted and that the depositions of each of the foreign defendants' 30(b)(6) witnesses and six of their officers, directors and managing agents be conducted in Washington, D.C., or such other location in the United States as may be agreed upon, provided that plaintiffs shall reimburse defendants for the reasonable costs of deponents' travel to the United States, including lodging and food, to attend the depositions.

September 10, 2001

Stephen J. Pollak
Special Master